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No. 87-1956

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, *et al.*,
Appellants,
v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.,
Appellee.

On Appeal from the United States District Court for the District of Minnesota

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MOTION OF APPELLEE MINNESOTA NEWSPAPER ASSOCIATION, INC. TO AFFIRM

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June 27, 1988

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RULE 28.1 LISTING

Appellee Minnesota Newspaper Association, Inc. has no parent companies, subsidiaries, or affiliates within the contemplation of Supreme Court Rule 28.1.

TABLE OF CONTENTS

	Page
STATEMENT	1
ARGUMENT	2
CONCLUSION	6

TABLE OF AUTHORITIES

Cases:

Arkansas Writer's Project, Inc. v. Ragland, 107 S. Ct. 1722 (1987)	3
Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983)	3
First Natl. Bank v. Bellotti, 435 U.S. 765 (1978)	3
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)	5
Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations, 413 U.S. 376 (1973)	4
Thornhill v. Alabama, 310 U.S. 88 (1940)	3

Constitution and Statutes:

Amendment I	2, 3, 5
18 U.S.C. § 1302	1, 2, 4, 6

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Pursuant to Rule 16.1, appellee Minnesota Newspaper Association, Inc. moves to affirm that portion of the decision of the United States District Court for the District of Minnesota from which appellants have taken their appeal. The basis for appellee's motion is that the question presented is so unsubstantial as not to need further argument.

STATEMENT

Section 1302, para. 5 of Title 18 prohibits the mailing of various publications, including newspapers, that contain advertisements which might promote lotteries and other games of chance. A separate clause of the same

section also makes it a crime to publish "any list of the prizes drawn or awarded" with respect to such games.

As part of its decision below, the District Court held that this restriction on the publication of prize lists was facially invalid under the First Amendment.

(The District Court also ruled that § 1302 and related provisions of federal law were not unconstitutional to the extent they barred the dissemination of advertising about such games, even where the games were legal under state law. That portion of the District Court's decision has been separately appealed by appellee herein as No. 87-1943.)

In reaching its decision, the District Court reasoned that a prize list published as part of an advertisement would be subject to the advertisement clause of the statute, and so could be validly restricted without reference to the prize list clause. The Court therefore concluded that the separate prize list clause might well be intended to apply to nonadvertising materials. As a result, it must satisfy the higher standard of review appropriate for noncommercial speech. The District Court then determined that the prize list clause did not meet that standard, and was therefore invalid.

ARGUMENT

Section 1302 contains a prohibition on lottery advertising, and a separate and independent prohibition that applies to prize lists. In the context of newspapers, a prize list that is part of a paid advertisement could obviously be considered commercial speech. But such a list would then be governed by the advertising clause of the statute, according to the District Court. So either the prize list clause is redundant, or it has some other purpose. Nothing in the text of the statute itself indicates redundancy, since the language of the prize list clause is without limitation.

The District Court therefore reasonably concluded that the prize list clause could well be interpreted to extend to noncommercial (i.e., news and editorial) publications of the lists. And if prize lists may also be news, the District Court correctly held that the commercial speech rules do not apply.

Where a newspaper desires to publish a prize list, without remuneration from the sponsor of the particular game, its decision to publish involves news and editorial judgment, and it is therefore entitled to the full measure of First Amendment protection. In order to justify any restriction on such a publication, the government must show the restriction is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Arkansas Writer's Project, Inc. v. Ragland*, 107 S. Ct. 1722, 1728 (1987). Content-based restrictions on noncommercial speech have been sustained "only in the most extraordinary circumstances." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983).

A statutory restriction on publishing prize lists, apart from cases where the publisher is compensated by the promoter, acts as a restraint on the editorial decision making process. "The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *First Natl. Bank v. Bellotti*, 435 U.S. 765, 776 (1978), quoting *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940).

Appellants claim to identify a "fatal flaw" in the District Court's reasoning. They assert that the District Court incorrectly assumed that commercial speech is basically the same as advertising, and that in reality, various types of nonadvertising matter are also included within the definition of commercial speech. They suggest that prize lists might be one instance of this, in certain situations. Brief of Appellants, p. 12.

In support of this proposition, appellants argue that commercial speech is comprised of those forms of expression that do "no more than propose a commercial transaction" (citing *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376, 385 (1973)), and that advertising is but a subcategory of this type of expression. Brief of Appellants, p. 12. Although appellants do not proceed to define "advertising", they seem to assume that it refers simply to the publication of matter in exchange for a consideration.

In seeking to establish a distinction between commercial speech and advertising, appellants describe what they believe are some examples of nonadvertising publications of prize lists that should nonetheless be considered to be commercial speech: (1) The publication of a list of prizes by a newspaper where the newspaper expected to receive a share of the lottery's proceeds; (2) publication of the list where the newspaper itself sponsored the lottery; and (3) "if the newspaper were paid to publish a list of prizes, such a list should be regarded as commercial speech, because it would be speech about a commercial transaction that the newspaper had been directly paid to promote." Brief of Appellants, pp. 13-14.

Of the above-described examples cited by appellants, the first and third would almost certainly seem to fall within the definition of advertising in any case, and therefore no fine commercial speech distinctions are necessary in order to make them subject to the District Court's determination that they may be prohibited under § 1302. In both examples the newspaper receives consideration for the publication of the list.

Insofar as this appeal relates to the publication of prize lists in newspapers, appellants would therefore seem to be saying that under the District Court's decision, newspapers are able to promote their own lotteries (though solely by the publication of lists of prize win-

ners), and that this concern is of such magnitude as to justify further argument before this Court. Except for such publications, there would not appear to be any other situations that would not already be covered by the District Court's decision involving advertising prohibitions, at least as far as newspapers are concerned.

In response, appellee would simply note that newspaper sponsored lotteries are rather infrequent, that publication of the prize list alone (which is all the District Court decision permits) is hardly a major promotional tool, and that such a publication might well be defined as advertising anyway if the newspaper were sponsoring the lottery. In short, appellants' concerns are largely insignificant.

And not only are the commercial speech/advertising distinctions posed by appellants unsubstantial, but if recognized, they would cause great confusion among newspaper staffs about where exactly the line should be drawn between permissible and impermissible material, since appellants concede that some prize list publications are allowed. This would produce a deterrent effect that is constitutionally defective. The fear of subsequent punishment could chill many publications, and would thereby infringe on the discretion that the Constitution requires be left to the newspaper staff. "The choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press. . . . " *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

The District Court found that appellants had identified no compelling interests by which to sustain the prize list clause, and indeed appellants do not pretend there are any. They rely instead on the above-described "flaw" in the District Court's reasoning.

Appellee would submit that there is no such flaw, and that, with respect to its decision on the prize list clause of § 1302, the District Court was correct in its concerns about the statute infringing on the news and editorial discretion of newspapers.

CONCLUSION

The judgment of the District Court should be affirmed, as it relates to the prize list clause of § 1302.

Respectfully submitted,

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